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Supreme Court, U.S.
FILED
2004
OFFICE OF THE CLERK

No. 04-494

IN THE

Supreme Court of the United States

EDWARD OVERMAN,

Petitioner,

v.

ANDREW TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

STEPHEN E. KNOERR
JACQUELINE G. EMANUEL*
RILEY, KNOERR & EMANUEL
Attorneys for Respondent
700 S.E. 3rd Ave., Suite 401
Fort Lauderdale, FL 33316
(954) 524-1888

* *Counsel of Record*

190741

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

When considering the "totality of the circumstances" under the Eleventh Circuit's standard of "arguable probable cause," is it appropriate to ignore knowing, willful and deliberate misconduct by a law enforcement officer including falsifying a probable cause affidavit, lying to supervisory personnel and lying to the prosecuting agency, when considering the defense of qualified immunity.

As the body of this Brief makes clear, the underlying basis for the question presented for review by Petitioner is not supported by the record evidence, nor the Eleventh Circuit's holding; specifically there were no false statement contained in the probable cause affidavit, the alleged misconduct of Respondent, Taylor, calls for an analysis of his subjective intent, which is contrary to the dictates of this Court.

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Respondent, Andrew Taylor, requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion entered by the United States Court of Appeals for the Eleventh Circuit in this case on May 7, 2004.

STATEMENT OF THE CASE

Respondent, Andrew Taylor, cannot accept the "statement" submitted by Petitioner, Edward Overman, because it contains many false statements of facts, misstatements of facts, and facts irrelevant to the proper disposition of Overman's Petition. Respondent, Taylor, submits the following, taken verbatim from the Order of the United States District Court for the Southern District of Florida granting Taylor's Renewed Motion for Summary Judgment, dated November 14, 2003, Appendix B to Petition.

On September 17, 1997, at about 2:00 a.m., Plaintiff Edward Overman, who was at that time the Chief of the Oakland Park Police Department, was arrested by BSO Deputy Andrew Taylor for driving under the influence ("DUI"). Taylor subsequently completed a probable cause affidavit detailing the grounds upon which he had concluded there was probable cause to believe Overman was impaired while operating a motor vehicle. Further evidence concerning whether probable cause existed has been developed in court documents and through discovery and will be summarized below. The following factual summary is based on both Defendant Taylor's Renewed Summary Judgment Motion and Reply, Plaintiff's Response to Defendant's Motion, and an independent review of the record.

Taylor, a member of the BSO's DUI Task Force, had initiated surveillance of Overman on September 17, 1997,

on a tip from William Washington, a former Oakland Park Police Department employee whose employment had been terminated by Overman due to allegations of misconduct. Washington, who had been informed by another member of the Oakland Park Police Department that Overman was at the Cheers Bar and Grill, claims to have witnessed Overman consume two to four alcoholic drinks. Washington contacted BSO dispatcher and left a message with Taylor, who called Washington on his cellular phone. Washington told Taylor that Overman was drunk and was about to drive from the bar. Upon meeting outside of Cheers about fifteen to twenty minutes later, Washington told Taylor that, by that time, he had observed Overman consume four to six drinks.[1] Taylor waited for 30 to 40 minutes outside the bar and followed Overman's car when he observed it leaving the parking lot. After following him for about three miles, Taylor discontinued following Overman after seeing no signs of impairment and observing no traffic infractions. Taylor then called Washington to inform him of this, but Washington apparently stated that he was going to call the BSO because Overman was going to kill someone.[2]

Taylor subsequently turned around, caught up with Overman, and began to follow him again. Thereafter, Taylor states that he saw Overman's vehicle weave out of his lane, into the next lane, and back into his lane again.[3] Taylor then

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1. There is some dispute in the record as to how many total drinks Washington told Taylor he had observed Overman consume.

2. In fact, although Taylor had no knowledge of this, Washington did call BSO 911 and reported Overman's driving pattern and that he was impaired.

3. There is no video recording showing this alleged traffic infraction, and Taylor did issue a citation for it.

turned on his onboard video camera[4] and observed Overman stop beyond the white stop bar at a traffic light at University Drive and then make a right turn and immediately cross several lanes to the far left lane. Overman admitted in his deposition that he stopped past the white stop bar at that light, that he went into the left lane without first straightening out in the right lane, and that he did not use his left turn signal to indicate he was changing lanes. Taylor then pulled Overman over for violating two Florida Motor Vehicle Statutes due to these actions and issued two traffic citations.[5]

Plaintiff contends that his experts, after review of the videotape recorded on Taylor's onboard camera, concluded that Overman did not commit any traffic infractions. However, statements from their affidavits indicate otherwise. Plaintiff's experts Kenneth Harms admitted that "the stop that I saw [in the video] occurred partially ever, as I recall, and to the west of the stop bar itself. There was then a subsequent turn to the right, Overman was in the right lane for a very brief moment in time. And he then moved across the center lane and into the left thru lane."[6] Plaintiff's other

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4. Although Plaintiff alleges that Taylor had previously activated his video camera during the initial three-mile surveillance of Overman and that he erased this footage, there is no evidence in the record that this occurred and, even if it had, it would create no material dispute given Taylor's concession that he observed no signs of impairment or traffic infractions until after he had turned around and caught back up with Overman.

5. Florida Statutes § 216.075(3)(a)(1) states that vehicles must stop before the white line at intersections. Florida Statutes § 316.151(1) states that right turns must be made "as close as practicable to the right-hand curb or edge of the roadway."

6. Harms stated that he would discourage officers from stopping for these types of infractions and that he would not use a stop for (Cont'd)

expert, Steven Liebowitz, stated that "[y]ou're supposed to stop before the white bar" and that stopping after that bar "is, yes, absolutely a technical traffic infraction," merely noting that "I distinguish between what a reasonable prudent officer would make a stop for."[7]

Upon stopping him, Taylor asked Overman if he suffered any physical infirmities or was on any medication. Overman responded in the negative to both questions. Taylor also asked Overman whether he had consumed any alcohol, to which Overman admitted he had consumed "a couple of drinks," stating later that he had consumed three beers. Taylor detected the odor of alcohol on Overman's breath, observed that his eyes were bloodshot, and noted that his face appeared flushed. Taylor had been trained that these conditions could be physical signs of impairment due to alcohol consumption. Overman does not dispute that the odor of an alcoholic

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(Cont'd)

this type of violation as a pretext for checking to see if a driver was under the influence. However, he does not state that the stop was illegal, stating, instead, that he would only stop drivers for this type of violation in order to give them a warning. Further, he noted that if he had stopped someone on that basis and the observed sufficient indications that the driver might be impaired, he would have then administered roadside sobriety tests.

7. Even when taken in the light most favorable to the Plaintiff, Overman's experts' dispute over whether Overman actually violated the Florida Statutes that Taylor citing him for violating, this factual dispute is immaterial because, as discussed below, based on the undisputed statements of Overman and his experts, the Court concludes that a reasonable officer could have determined that Overman's actions constituted traffic infractions for which a stop was authorized, even if, in fact, Overman did not commit the infractions.

beverage was coming from his mouth. There are indications that Overman's eyes may have been red because he had been awake for twenty hours and that his face was sunburned, rather than flushed.

Overman voluntarily consented to perform roadside sobriety tests: the horizontal gaze nystagmus test, the standing balance or standing count test, the walk-and-turn test, and the finger-to-nose test. Although Plaintiff's expert disputes that all of these tests were administered correctly, Taylor (1) noted a lack of smooth pursuit and nystagmus at maximum deviation during the horizontal gaze nystagmus, (2) recorded that Overman had a slight sway and estimated thirty seconds when only seventeen had passed on the Rhomberg balance test, (3) indicated that Overman lost his balance during instructions, stepped off to the side, and left gaps of one to two inches several times on the walk-and-turn test, and (4) reported that Overman swayed, lost his balance twice, dropped his foot, and raised his arms twice on the one-leg stand. Overman admitted that he did not do the balancing tests well, likely due to hearing and inner ear problems. However, he also admitted that he knew of these hearing problems before his arrest by Taylor and that he did not tell Taylor about these medical problems. Taylor stated that he had specifically asked Overman if he had any medical infirmities prior to conducting the roadside sobriety tests. Overman further admitted that he stepped off to the side while attempting to walk in a straight line on the walk-and-turn test.[8]

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8. Overman and his expert, Liebowitz, allege that Taylor deliberately misinstructed Overman on at least two of the tests and conducted the horizontal nystagmus test incorrectly. Despite the dispute over whether all of these tests were administered entirely

(Cont'd)

Subsequent to these roadside tests, Taylor stated that he felt he had probable cause to establish impairment due to alcohol consumption and arrested Overman for driving under the influence in violation of Florida Statutes § 316.193. He transported Overman back to the BSO, where Overman voluntarily submitted to two intoxilyzer or breath tests conducted by Community Service Aid Franca DiCienzo. The first test indicated a blood alcohol content of .043 grams of alcohol per 210 liters of breath and the second indicated .039 g/210L. In Florida, a breath test of less than .05 g/210L creates a presumption that the person was not impaired, no presumption can be drawn from a breath test of between .05 and .08, and a breath test of .08 or above creates a presumption of impairment. Overman's breath test was conducted about an hour and ten minutes after he was stopped by Taylor.[9]

(Cont'd)

correctly, the Court finds that there is no material dispute in this regard because, as discussed below, Overman's admissions regarding his performance on these tests are sufficient to support that Taylor had arguable probable cause for an arrest. Liebowitz also claims that Taylor should not have used one of the tests that he administered – the finger-to-nose test – because it is not validated by the State of Florida. Liebowitz then admits that his department does use that test and "imposes it upon" him. Thus, Plaintiff would be hard pressed to demonstrate that it was clearly established that use of this test is improper.

9. Assistant State Attorney Lee Cohen indicated that his office would prosecute someone with a low breath test for DUI "[i]f there's other evidence of impairment or if there are other substances impairing them." He further noted that the breath tests were taken "an hour and one minute or so after the incident. So his breath alcohol level at the time of driving certainly could have been higher . . . And

(Cont'd)

At the BSO, Taylor completed a probable cause affidavit, which was subsequently filed with the court and provided to the State Attorney's Office (SAO). The affidavit did not include any reference to Washington, nor did it indicate that Taylor had been acting on a tip of any kind when he stopped Overman. However, in the affidavit, Taylor did set forth many of the other facts noted above, indicating that he saw the defendant weave in and out of his lane, not come to a complete stop at University Road, and then make a wide right turn. The affidavit further recorded Taylor's above-noted observations regarding Overman's appearance and physical signs of possible impairment, report Overman's verbal statements regarding having no illnesses, injuries or medication and that he had consumed three drinks, and summarized Overman's performance on the roadside sobriety tests. Assistant State Attorney ("ASA") Lee Cohen noted in his deposition that "there was nothing that we found that wasn't true in the probable cause affidavit." The probable cause affidavit was taken with Overman to the main jail, where Overman was booked and later released.

It is undisputed that Taylor did not reveal everything that might have been relevant to this case, either in the probable cause affidavit or during a meeting with the SAO on August 18, 1997.[10] He did not disclose that he had initially received

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people can very easily be impaired with breath alcohol levels of .05 . . . So if he's impaired, whether it's due to his age, his physical condition, or a combination of everything, if he's impaired and he's impaired at an .05, you know, there could be a case to charge." Plaintiff's expert, Liebowitz, admits that charges can be filed for DUI on a breath test indicating less than .05 g/210L.

10. In fact, much of Plaintiff's statement of facts in response to this motion for summary judgment discusses items that were omitted (Cont'd)

a tip from Washington, that he had waited outside of Cheers for nearly forty minutes, and that he had followed Overman for three miles without observing traffic infractions or signs of impairment. Taylor claims he did not identify Washington as a witness in the probable cause affidavit because he did not believe Washington was a witness. In response to questions asked during the meeting with the SAO, Taylor falsely stated that he did not know that Overman was the Chief of the Oakland Park Police Department until after the arrest, denied any knowledge of Washington, and failed to disclose Washington's involvement in the arrest, stating instead that Taylor had come upon Overman innocently while patrolling. On August 18, 1997, subsequent to the meeting with the SAO, Taylor did reveal Washington's involvement and other circumstances involving Overman's arrest to his supervisor, Jones. These additional facts were related to the SAO on August 20, 1997, which decided to wait until some additional witnesses had been interviewed before making a filing decision of the case.[11] On August 27, 1997, the SAO decided not to prosecute and filed a "no information"

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from the probable cause affidavit and not related by Taylor to the SAO. Further, his argument against summary judgment relies heavily on the absence of this "exculpatory" information, alleging that this provides a basis for finding there are material factual disputes as to whether arguable probable cause for the arrest existed.

11. While Plaintiff's allegation that "no Defendant informed prosecutors of Taylor's lies and omissions" may technically be true, prosecutors were advised, within three days of the arrest, of all the background facts, including Washington's involvement and Taylor's admissions, by two Office of Professional Compliance investigators from the BSO. *See* September 20, 2002 Order on Motions for Summary Judgment at 6.

dismissing the case. Taylor, who had been put on restricted administrative assignment on August 18, 1997, was subsequently discharged from the BSO. However, ASA Cohen noted in his memorandum concerning filing a "no information" and in his subsequent testimony that Taylor had probable cause for the arrest and that his actions with regard to Overman did not constitute criminal conduct.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with the dictates of this Court. Contrary to Overman's representation, the lower courts did not look to what Taylor allegedly and subjectively could have believed in determining that he was entitled to qualified immunity. To the contrary, the Eleventh Circuit's first Opinion filed August 14, 2003 (Appendix C to Petition) remanded the case to the Trial Court specifically on the ground that the Eleventh Circuit found that the Trial Court improperly considered Taylor's subjective motive or intent in contravention of the principles of qualified immunity. The Trial Court was instructed to reevaluate Taylor's claim for qualified immunity under the two-part framework articulated in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001).

Overman's Petition herein is replete with his interpretation of Taylor's subjective intent and motive in support of his argument that issues of material fact were present at the time of summary judgment.

In fact, the Trial Court below took pains to comply with the Eleventh Circuit's instruction on remand and specifically set forth that the Court must first determine whether the facts, taken in the light most favorable to the party asserting the

injury, shows that the official's conduct violated a constitutional right. If so, then the Court must determine whether that constitutional right was "clearly established" at the time of the alleged violation. For a right to be clearly established for qualified immunity purposes, it must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Trial Court further defined the "reasonable officer" standard as an entirely objective standard and correctly stated that the subjective intention of the officer is irrelevant when determining whether the officer is entitled to a defense of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Lee v. Ferraro*, 284 F.3d 1188, 1193 n.2 (11th Cir. 2002), *rehearing on en banc denied*, 2002 WL 1049396 (11th Cir., May 13, 2002).

As the Trial Court correctly noted in its Order granting Taylor's Renewed Motion for Summary Judgment, there is no evidence to support Overman's accusations that the probable cause affidavit contained false statements and lies. At best, the probable cause affidavit omitted the information pertaining to Washington. However, each statement in the probable cause affidavit was true and corroborated by the officer who performed the breath tests, F. DiCienzo, and Assistant State Attorney Lee Cohen, who testified specifically that Taylor had probable cause for the arrest and that his actions with regard to Overman did not constitute criminal conduct. Additionally, Overman's own expert testified that his traffic infractions were grounds for a stop. All witnesses agreed that the videotape corroborated Taylor's probable

cause affidavit. Overman's accusations to the contrary are not only unfounded but are not supported by the record evidence including his own admissions at deposition and his experts' deposition testimony.

Overman's continued and persistent accusations of manufactured evidence and falsifying of probable cause affidavit have never been supported by any record evidence in this case, nor can Overman point to any evidence in the record to substantiate these meritless accusations.

The question of whether a reasonable officer could have believed that he had probable cause for an arrest is a question for the Court, not for the trier of fact. *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S. Ct. 534, 536-537 (1991). This Court has previously held that the qualified immunity standard gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. *Hunter*, *supra*, 502 U.S. at 229, 112 S. Ct. at 537.

Where, as here, an officer has probable cause to believe that an individual has committed even a very minor criminal offence in his presence, he may, without violating the Fourth Amendment, arrest the offender. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 1557 (2001).

The essence of Overman's Petition is based upon the purported subjective motives and intent of Taylor, to wit; that he received a tip from Washington, a disgruntled ex-employee of Overman, which initiated his interest in Overman, and the omission of the reference to Washington in the probable cause affidavit. The allegations of subjective intent and motive are improper considerations for purposes of qualified immunity. Moreover, they are irrelevant to the

independent determination of probable cause made by Taylor based upon his observations of Overman committing three traffic infractions in his presence, the odor of alcohol and the admission to having consumed alcohol, the poor performance on the road sobriety tests coupled with Overman's denial of any physical or medical problems which would have explained some of his poor performances, had he truthfully revealed them at the time, the independent officer's physical observations of Overman at the time of the breathilyzer test, and the independent determination by the Assistant State Attorney that the probable cause affidavit did not contain false statements and that Taylor had probable cause for the arrest.

The rulings of the Trial Court and the Court of Appeals for the Eleventh Circuit clearly do not conflict with the dictates of this Court, but rather have been guided by this Court's previous Opinions and have issued the subject Orders in accordance thereto.

Overman has completely failed to invoke this Court's discretionary jurisdiction on this Petition for Writ of Certiorari. The Petition does not raise the compelling reasons that would invoke this Court's discretion, but rather, this Petition clearly asserts error consisting of erroneous factual findings and misapplication of a properly stated rule of law. Overman has not met his burden of raising compelling reasons for the invocation of this Court's judicial discretion. U.S. Sup. Ct. Rule 10. *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991). The Eleventh Circuit's decision does not conflict with the dictates of this Court and should be affirmed.

CONCLUSION

For the foregoing reasons, Respondent, Andrew Taylor, asks that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

STEPHEN E. KNOERR
JACQUELINE G. EMANUEL*
RILEY, KNOERR & EMANUEL
Attorneys for Respondent
700 S.E. 3rd Ave., Suite 401
Fort Lauderdale, FL 33316
(954) 524-1888

* *Counsel of Record*